86-161 (1)

Supreme Court, U.S.
FILED
JUL 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner
v.
ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Isabel D. Wood
Post Office Box 16146
Phoenix, Arizona 85011
(602) 248-7921

52pp

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner
v.
ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Isabel D. Wood
Post Office Box 16146
Phoenix, Arizona 85011
(602) 248-7921

QUESTION PRESENTED

Whether the Courts of the State of Arizona violated Petitioner's right to petition a government officer for redress, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States by requiring Petitioner and Petitioner's attorney, personally, to pay attorney's fees to the government, prostituting the rights of Petitioner and intimidating others to not petition the county and state governments for redress.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, Petitioner certifies that the following is a complete list of all parties to the proceedings below:

Black Cloud Building Corporation, an Arizona corporation, Petitioner-Plaintiff

Dr. Lloyd F. Novick, Director, Arizona Department of Health Services, Respondent-Defendant

Robert G. Harman, Director, Maricopa County Department of Health Services, Respondent-Defendant

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AT ISSUE . . 2

STATEMENT OF THE CASE 3

Background 3
Proceedings in the Trial Court . . . 5
Proceedings in the Court of Appeals . . 6
Proceedings in the Supreme Court . . 9

REASON FOR GRANTING THE WRIT . . . 11

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDIX 1a

Supreme Court Order of May 7, 1986 . 1a
Supreme Court Order of March 26, 1986 . 3a
Court of Appeals Order of February 21, 1986 . . . . . 5a
Court of Appeals Memorandum Decision of December 17, 1985 . . 8a
Superior Court Order of Dismissal of January 2, 1985 . . . . . 22a
Letter from Black Cloud Building Corporation to David R. Postal dated December 20, 1986 . . . . . 27a

TABLE OF AUTHORITIES

Cases

Allen v. State
183 Wis. 323, 197 NW 808, 39 ALR 782 . 12

Anderson v. Central Point School District
554 FS 600 (1982) 8

Bantam Books, Inc. v. Sullivan
327 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d
584 (1963). 8

Black Cloud v. Maricopa County
___Ariz.___, ___P.2d___ (filed 12-10-85) . 10a

Boyd v. The United States
116 U.S. 635, 6 S.Ct. 535, 29 L.Ed. 746 . 14

De Jonge v. Oregon
299 U.S. 353, 57 S.Ct. 255, 81 L.Ed.
278 (1937). 8

Gideon v. Wainwright
327 U.S. 335 (1963) 13

Nebraska Press Ass'n v. Stuart
427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d
683 (1975). 8

New York Times Co. v. United States
403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d
822 (1970). 9

Roer v. Superior Court In and For Coconino
County, a Ariz.App. 46, 417 P.2d 559
(1966) 16a

State v. Kelsall
22 Ariz.App. 97, 523 P.2d 1334 (1974) . . 15a

Thomas v. Collins
323 U.S. 516, 655 S.Ct. 315, 89 L.Ed 435 (1945) 8

Vance v. Universal Amusement Co., Inc.
445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1970) 8

Walker v. Walker
18 Ariz.App. 113, 500 P.2d 898 (1972) . . 10a

Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 687 P.2d 354 (1984) 8,10,18a,25a

Constitutions

United States, First Amendment 2,6,7,8,12,14,15

United States, Fourteenth Amendment 3, 6, 7, 8,14,15

Arizona, Article II, § 5 6,7,8

Statutes

28 USC § 1257(3) 2

Arizona Revised Statutes § 12-120.21 6

12-341.01(C) 10a, 13a, 17a 18a, 19a, 20a
12-348(A)(3) 18a, 19a, 20a

12-904 5

12-908 . . . . . 16a

12-2021 . . . . . 17a

12-2030 . . . . . 17a

Arizona Revised Statutes § 12-2101B 6

41-1011 . . . . . 14a

Rules

United States Supreme Court, Rule 21.1(b) . . ii

Arizona Rules of Civil Appellate Procedure
Rule 21c 20a

Rule 25 . . . . . 6, 20a

Rule 54b 24a

Arizona Local Rules, Rule 3.7(e) 14a

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner
v.
ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Petitioner Black Cloud Building Corporation prays that a Writ of Certiorari issue to review the Order of the Supreme Court of Arizona entered in this matter on March 26, 1986 and the Ordered entered in this matter on May 2, 1986, as well as the Order of the Arizona Court of Appeals dated February 21, 1986, the Arizona Court of Appeals Memorandum Decision of December 17, 1985, and

the Superior Court Order of Dismissal of January 2, 1985.

OPINION BELOW

The Orders of the Supreme Court of the State of Arizona and the Court of Appeals of the State of Arizona, the Memorandum Decision of the Court of Appeals of the State of Arizona and the Order of Dismissal of the Superior Court of Maricopa County are reproduced in the Appendix.

JURISDICTION

The Supreme Court of the State of Arizona entered its Order denying Petitioner's Motion for Reconsideration on May 2, 1986 (App. 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AT ISSUE

Amendment I to the Constitution of the United States of America:

> Congress shall make no laws respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the

people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV to the Constitution of the United States of America:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Black Cloud Building Corporation was denied equal protection of the law and its right to petition the government for a redress of grievances was prostituted by the Supreme Court of the State of Arizona, the Court of Appeals of the State of Arizona and the Superior Court of Maricopa County by ordering Petitioner and Petitioner's attorney to pay attorney's fees to the government for exercising its fundamental and unalienable rights.

Background

Petitioner Black Cloud Building Corporation is

a general contractor licensed by the State of Arizona. It constructed Village East Condominiums, a 24 unit housing development in the City of Phoenix, Maricopa County, Arizona. A $7\frac{1}{2}$ feet by $7\frac{1}{2}$ feet, 36 inch deep fiberglass spa is part of the common area of the development. Petitioner believes the spa to be private whereas the Maricopa County Department of Health Services classified it semi-public, and thus subject to licensing and regulation. [1]. Respondent Robert G. Harman, Director, Maricopa County Department of Health Services, hereinafter Maricopa County, issued a Cease and Desist Order against Petitioner restricting the use of the spa on August 9, 1983. Petitioner requested Respondent Dr. Lloyd F. Novick, Director, Arizona Department of Health Services, hereinafter State of Arizona, to restrain the excessive and over zealous actions of Maricopa County, but to no avail.

---

[1] Petitioner brought a seperate parallel action for a declaratory judgment relating to various rules of Maricopa County which is not included in this Petition. Marciopa County Superior Court Cause No. C-478669, Arizona Court of Appeals No. 1 CA-CIV 7427, Arizona Supreme Court No. CV 86-0024-PR.

An administrative hearing was conducted by Maricopa County on October 20, 1983. A rehearing was timely requested by Petitioner and denied by Maricopa County.

Proceedings in the Trial Court

A complaint was filed on December 14, 1983 seeking review of Maricopa County's administrative hearing, pursuant to Arizona Revised Statutes, § 12-904. The Order of Dismissal, which is reproduced in the Appendix, states in pertinent part:

> . . . as there's more than one way to chill plaintiff's and others' rights to sue public officials . . . the Court must be careful to assure that the fee awarded these defendants is reasonable in amount.
>
> Given the above, and having considered the description of legal services on behalf of defendants Novick and Arizona Department of Health Services, the Court concludes that an award of $2,500 is both reasonable under the circumstaces (sic) and not likely to deter real estate developers or commercial contractors such as plaintiff from suing public officials when they conclude in good faith that their rights have been violated.

Petitioner raised the constitutional issues in the trial court in its Reply to Response to Motion for Amendment of Judgment:

> The purpose of this Motion is to allow the Trial Court to conform their Judgments to The United States Constitution, Amendments One and Fourteen, and Arizona State Constitution, Article II, Section 5, the right to petition a government officer for redress.

(Superior Court Record 39b).

Proceedings in the Court of Appeals

A Notice of Appeal was filed on February 1, 1985 pursuant to Arizona Revised Statutes §§ 12-120.21 and 12-2101B. The Memorandum Decision, which is reproduced in the Appendix, states in pertinent part:

> Both the State and County Health Departments have requested attorney's fees for litigating this appeal on grounds the appeal is frivolous. We agree. Pursuant to Rule 25, Arizona Rules of Civil Appellate Procedure, we award attorney's fees to both the State and the County.

The Court of Appeals filed an additional Order on February 21, 1986. The Order, which is reproduced in the Appendix, states in pertinent part:

> IT IS FURTHER ORDERED allowing appellee State of Arizona attorney's fees in the amount of $3,239.65 covering the items specified in the request for attorney's fees.
>
> IT IS FURTHER ORDERED allowing appellee Maricopa County attorney's fees in

the amount of $942.49 covering the items specified in the request for attorney's fees.

Petitioner raised the constitutional issues in the Court of Appeals in its Appellant's Opening Brief at page 9:

> The trial court's actions are a violation of Black Cloud's absolute right to seek redress from the government. The United States Constitution, Amendments One and Fourteen, and the Arizona Constitution, Article II, Section 5, give Black Cloud an absolute right to petition a government officer for redress. The trial Court is blatantly punishing Black Cloud for exercising this right to seek redress. Our forefathers fought a very bloody war over two hundred years ago to obtain this sacred right to seek redress and an arrogant trial judge cannot take away this right by imposing awards of ruinious attorney fees against one who would dare seek redress from an officer of the State of Arizona.
>
> The State of Arizona complains that the action sub judice is extremely annoying because it requires time and effort to defend their actions.(R.37a,L.20-24) If this reasoning is allowed to prevail then any petition for redress complaining of the State's actions or inactions could be classified as frivilous. In an open and free society the government's actions or inactions are always subject to challange by the people, and their right to petition for redress cannot be abridged.
>
> A.R.S.[Arizona Revised Statutes] Section 12-341.01.C does not authorize the award of attorney's fees to the government to discourage the people from petitioning for redress from oppressive rules and regulations. To so hold

would be contrary to the Arizona Constitution, Article II, Section 5, and the United States Constitution, Amendments One and Fourteen. Surely the Legislature did not intend to create unconstitutional law.

Freedom of speech, press, petition and peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected by the Fourteenth Amendment against infrigement by state legislatures. Thomas v. Collins, 323 U.S. 516, 530, 655 S.Ct. 315, 89 L.Ed. 430 (1945); De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937).. . .

> "An award of attorney's fees would be contrary to public policy . . . because it would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials . . . we should encourage resolution of constitutional arguments in court rather than on the streets." 141 Ariz. (sic) [Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 687 P.2d 354 (1984).

The United States District Court of Oregon defended this basic right of the people to petition the government for redress in Anderson v. Central Point School District:

> "The [United States Supreme] Court has held on numerous occasions since 1968 that any law which imposes a prior restraint on the exercise of first amendment rights come to the court 'with a heavy presumption against its constitutional validity.'Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413 (1970), quoting Bantam Books, Inc. v. Sullivan, 327 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558, 96 S.Ct. 2791,

> 2802, 49 L.Ed.2d 683 (1975); New York Times Co. v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1970)." 554 FS 600 (1982)

Proceedings in the Supreme Court

A Petition for Review was filed on January 2, 1986. The Order of the Supreme Court, which is reproduced in the Appendix, states in pertinent part:

> FURTHER ORDERED: The defendants-respondents may apply to the court for the allowance of attorney's fees in opposing the petition for review. Said attorney's fees will be payable by counsel for the plaintiff-petitioner personally without being charged to the client. (Emphasis added.)

The Supreme Court filed an additional Order on May 7, 1986 denying Petitioner's Motion for Reconsideration. It also stated in pertinent part:

> "ORDERED: Statement of Attorney's Fees approved in the sum of $109.36 to Maricopa County and in the sum of $840.01 to the State of Arizona.

Petitioner raised the constitutional issues in the Supreme Court in its Petition for Review on page 8:

> Black Cloud has an absolute right under the United States constitution to use the courts of this State to seek redress from an oppressive order from a governmental agency. Black Cloud should not have to fear the financial burden of

> paying attorney's fees to the government if its action is not successful. This is not a case of repeated actions being filed. This is a request for redress; for relief from a burdensom cease and desist order. The courts of this State must remain open to the people for redress of government conduct which the people feel is burdensom. Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 687 P.2d 354 (1984)

The issue of attorney's fees was raised again in Petitioner's Motion for Reconsideration to the Supreme Court, as well as in Petitioner's letter which was attached to the Motion. (App. 27a).

REASON FOR GRANTING THE WRIT

This case raises questions of the highest importance to the maintenance of our federal system of government. It involves claims by the courts of the State of Arizona that there is no duty on state officials to obey the United States Constitution or this Court's considered interpretation of the United States Constitution. In denying the Petition for Review and directing Petitioner's attorney to personally pay attorney's fees to the government, the Supreme Court of the State of Arizona prostituted Petitioner's fundamental and unalienable right to petition the government for redress of grievances and has discouraged others similarly situated from seeking redress in the courts.

The courts of the State of Arizona have renounced this fundamental right to petition the government for redress and have taken it upon themselves to set a fee schedule for petitioning the State and local governments.

Petitioner choose to settle a dispute with the

Maricopa County and State of Arizona Health Departments in the courts. Petitioner believed, and still does believe that its cause is meritorious. However, by exercising its fundamental and unalienable right to petition the government for redress it has been subjected to paying to the government a fee of $6,682.14 and its attorney was personally subjected to paying a fee of $949.37 to the government. [2]

This fundamental right is set forth in the First Amendment to the Constitution because the founding fathers of this Nation feared government abuses. See Allen v. State, 183 Wis. 323, 197 NW 808, 39 ALR 782.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of

---

[2] Petitioner was ordered to pay attorney's fees as follows: to the State of Arizona in Superior Court $2,500.00; to the State of Arizona in the Court of Appeals $3,239.65; to Maricopa County in the Court of Appeals $942.49; to the State of Arizona in the Supreme Court $840.01; and to Maricopa County in the Supreme Court $109.36; Total: $7,631.51.

> the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Emphases added) Amendment I to the United States Constitution.

THis fundamental and unalienable right to petition the government for redress of grievances also applies to the various states.

> . . . those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. Gideon v. Wainwright, 327 U.S. 335, 341 (1963)

The State of Arizona has set a fee schedule for petitioning the government for redress of grievances: $2,500 at the Superior Court level, $4,182.14 at the Court of Appeals level and, at the Supreme Court level the attorney must himself pay $949.37.

This abuse of authority by government is an old and continuing problem. Petitioner was well aware of it. See Petitioner's letter in the appendix. (App. 27a).

> Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis. Boyd v. The United States, 116 U.S. 635, 6 S.Ct. 535, 29 L.Ed. 746.

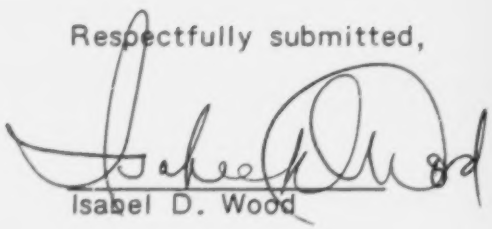
The facts, as contained in the various orders and judgments of the Arizona Courts, are indisputable. The controlling law is plain. The Superior Court and Court of Appeals of the State of Arizona violated Petitioner's constitutional rights and the Arizona Supreme Court compounded this violation by obnoxiously taxing Petitioner's attorney. The orders of the Arizona Superior Court, Court of Appeals and Supreme Court must be vacated as they apply to the award of attorney's fees to be paid by Petitioner and Petitioner's attorney to the government.

CONCLUSION

In its opinion, the Supreme Court of the State of Arizona made several determinations which, taken singly or together, deprived Petitioner of its right to petition a government officer for redress, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,



Isabel D. Wood

Date: July 30, 1986.

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondents by hand delivering same to counsels of record as follows:

Chip Wagoner
Assistant Attorney General
State of Arizona
1275 West Washington Street
Phoenix, Arizona 85007
Attorney for Dr. Lloyd F. Novick

Barbara Lee Caldwell
Deputy County Attorney
Office of the Maricopa County Attorney
Civil Division
201 West Jefferson, 7th Floor
Phoenix, Arizona 85003
Attorney for Robert G. Harman

Dated this 30th day of July, 1986.

Isabel D. Wood

SEAL

SUPREME COURT

STATE OF ARIZONA

201 West Wing State Capital
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602) 255-4536

David R. Cole
Clerk

Diana K Bentley
Chief Deputy Clerk

May 7, 1986

RE: BLACK CLOUD BUILDING CORPORATION vs.
ROBERT G. HARMAN et al
Supreme Court No. CV-86-0035-PR
Court of Appeals No. 1 CA-CIV 8246
Maricopa County No. C-502759

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 6, 1986, in regard to the above-referenced cause:

"ORDERED: Statement of Attorney's Fees approved in the sum of $109.36 to Maricopa County and in the sum of $840.01 to the State of Arizona.

FURTHER ORDERED: Motion for Reconsideration = DENIED.

Justice Hays did not participate in the determination of this matter."

DAVID R. COLE, Clerk

TO:

David Postal, Esq.
Thomas E. Collins, Maricopa County Attorney
Attn: Barbara Lee Caldwell, Esq.
Hon. Robert K. Corbin, Attorney General
Attn: Sheldon H. Muller, Esq.

pgk

SEAL

SUPREME COURT

STATE OF ARIZONA

201 West Wing State Capital
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602) 255-4536

David R. Cole
Clerk

Diana K Bentley
Chief Deputy Clerk

March 26, 1986

RE: BLACK CLOUD BUILDING CORPORATION vs.
ROBERT G. HARMAN et al
Supreme Court No. CV-86-0035-PR
Court of Appeals No. 1 CA-CIV 8246
Maricopa County No. C-502759

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 25, 1986, in regard to the above-referenced cause:

"ORDERED: Petition for Review = DENIED.

"FURTHER ORDERED: The defendants-respondents may apply to the court for the allowance of attorney's fees in opposing the petition for review. Said attorney's fees will be payable by counsel for the plaintiff-petitioner personally without being charged to the client.

"Justice Hays did not participate in the determination of this matter."

Record returned to the Court of Appeals, Division One, Phoenix, this 26th day of March, 1986.

DAVID R. COLE, Clerk

TO:

David R. Postal, Esq.
Thomas E. Collins, Maricopa County Attorney - Attn: Barbara Lee Caldwell, Esq.
Hon. Robert K. Corbin, Attorney General - Attn: Norman Chip Wagoner, Esq.
Glen D. Clark, Clerk, Court of Appeals, Division One

mag

RWD:kw:14.12

Division I
Court of Appeals
State of Arizona
Filed FEB 21 1986
Glen D. Clark, Clerk
By M. Chvey

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation, Plaintiff-Appellant, v. ROBERT G. HARMAN, Director Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services, Defendants-Appellees.	1 CA-CIV 8246 DEPARTMENT D MARICOPA County Superior Court No. C-502759 O R D E R

Appellee State of Arizona's request for attorney's fees, appellee Maricopa County's request for attorney's fees and appellant's objections thereto were considered by the court, Judges Eino M. Jacobson. Sarah D. Grant and Jack L. Ogg participating.

IT IS ORDERED overruling said objections.

IT IS FURTHER ORDERED allowing appellee State of Arizona attorney's fees in the amount of $3,239.65 covering the items specified in the request for attorney's fees.

IT IS FURTHER ORDERED allowing appellee Maricopa County attorney's fees in the amount of $942.49 covering the items specified in the request for attorney's fees.

DATED this 21st day of February, 1986.

/s/ Eino M. Jacobson
EINO M. JACOBSON, JUDGE

A true copy of the foregoing
order was mailed this 21st
day of February 1986, to:

Mr. David R. Postal
Attorney at Law
4449 North 12th Street
Suite 10
Phoenix, Arizona 85014
Attorney for Plaintiff-Appellants

Mr. Chip Wagoner
Assistant Attorney Generai
1275 West Washington Street
Phoenix, Arizona 85007
Attorneys for Defendants-Appellees

Mr. Jonathan H. Schwartz
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
Attorneys for Defendant-Appellees
Dept Health Services

GLEN D. CLARK, Clerk
By

/s/ Margaret M. Chvey

Deputy Clerk

Division 1
Court of Appeals
State of Arizona
Filed DEC 17 1985
Glen D. Clark, Clerk
By R. Ortegon

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation, Plaintiff-Appellate, v. ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services, Defendants-Appellee.	1 CA-CIV 8246 DEPARTMENT D MEMORANDUM DECISION Not for publication--Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court of Maricopa County

Cause No. C-502759

The Honorable B. Michael Dann, Judge

AFFIRMED

David R. Postal, P.C. Phoenix
by David R. Postal
Attorney for Plaintiff-Appellant

Tom Collins, Maricopa County Attorney Phoenix
by Barbara Lee Caldwell, Deputy County Attorney
and
Robert K. Corbin, Attorney General Phoenix
by Chip Wagoner, Assistant Attorney General
Attorneys for Defendants-Appellees

J A C O B S O N, Judge

In this appeal from a special action, the appellant, Black Cloud Building Corporation (Black Cloud), challenges the validity of an administrative decision issued by a hearing officer of the Maricopa County Health Department (County Health Department). The trial court dismissed Black Cloud's complaint and entered judgment in favor of both defendants-appellees. The trial court also awarded attorney's fees to the appellee Lloyd Novick, Director of the Arizona Department of Health Services (State Health Department).

On appeal, Black Cloud raises three issues for our determination: (1) whether Black Cloud was denied due process because of a lack of findings of fact and conclusions of law in the final written decision of the County Health Department's hearing

officer; (2) whether the trial court erred in granting appellee Lloyd Novick's motion to dismiss Black Cloud's complaint; and (3) whether the trial court erred in awarding attorney's fees pursuant to A.R.S. § 12-341.01(C) to Lloyd Novick and the State Health Department for a proundless or frivolous lawsuit. In its brief, the appellee Maricopa County also urges us to consider the trial court's denial of a requested award of attorney's fees for the County. However, since no cross-appeal has been filed by the County, the judgment of the trial court on that issue must stand, even though it may have been incorrect. Walker v. Walker, 18 Ariz. App. 113, 500 P.2d 898 (1972).

The facts in this case are not in material dispute and are best understood in conjunction with the facts of a companion case that preceded this lawsuit. See Black Cloud v. Maricopa County, ____ Ariz. ____, ____ P.2d ____ (filed December 10, 1985). Prior to November, 1982, Black Cloud began constructing the Village East Condominiums in Phoenix.

As part of that project, Black Cloud installed a fiberglass spa in the common area of the condominium development. In violation of the Maricopa County Health Code, Black Cloud failed to submit plans and to obtain a permit for the spa from the County Health Department.

After the County Health Department notified Black Cloud of these and other Health Code violations concerning the spa, Black Cloud brought a declaratory judgment action in superior court against Maricopa County (No. C-478669). In its complaint, Black Cloud challenged the authority of the County Health Department to define semipublic pools and bathing places and to issue licenses and assess fees. On July 22, 1983, the superior court denied Black Cloud's motion for summary judgment, concluding that under Arizona law the County had the right to regulate the installation and inspection of semipublic pools and to issue licenses and assess fees. On September 21, 1983, the trial court granted summary judgment in Cause No. C-478669 in favor of the

County Health Department. We have upheld that judgment on appeal. Black Cloud, supra.

While the superior court litigation was proceeding, on August 9, 1983, the County Health Department administratively issued a cease and desist order directing Black Cloud to cease operating the spa until such time as Black Cloud complied with the relevant County Health Code provisions. On August 16, 1983 Black Cloud requested an administrative hearing to review the cease and desist order. Pursuant to that request, a hearing was held on October 20, 1983 and a written decision was entered on November 10, 1983 by a hearing officer from the County Health Department. In this decision, the hearing officer found that a bathing place had been constructed at the Village East Condominiums and that the superior court had ruled that this bathing place was subject to regulation by the County Health Department. The officer then concluded that the superior court's ruling had mooted any decision which he might render in this matter. As a result, the officer declined to

enter any administrative orders.

On December 14, 1983, Black Cloud filed a second complaint in superior court (No. C-502759). This time Black Cloud sought special action review of the administrative proceedings, alleging that it had been denied due process because the administrative decision lacked findings of fact and concludions of law. In its complaint, Black Cloud listed the Director of the County Health Department as a defendant and, for the first time in all of this litigation, added the Director of the State Health Department as a defendant.

On February 7, 1984, the trial court granted the County Health Department's motion to dismiss the complaint, concluding that the issues raised therein had been previously litigated. On January 3, 1985, a formal order of dismissal was filed in the superior court which also dismissed the complaint against Director Novick of the State Health Department and granted judgment in favor of both defendants. Pursuant to A.R.S. § 12-341.01(C) and

local Rule 3.7(e), the court awarded $2,500.00 in attorney's fees to Director Novick and the State Health Department.

Black Cloud first maintaines that it was denied due process for lack of findings of fact and conclusions of law in the November 10, 1983 decision of the County Health Department's hearing officer. This contention is clearly without merit because the written decision of the County Health Department's hearing officer did contain the necessary findings of fact and conclusions of law. As stated, the written decision of the hearing officer included a factual finding that a bathing place had been constructed and a legal conclusion that the trial court's prior ruling had mooted any decision which the officer might make. This fully complies with A.R.S. § 41-1011.

Black Cloud next argues that the trial court erred in dismissing the complaint against the Director of the State Health Department on the basis that when the County Health Department issued the August 9, 1983 cease and desist order, it was acting as an

agent of the State Health Department and therefore, the State Health Department is responsible as a principal for the conduct of the County Health Department.

The sole support offered by Black Cloud for the existence of the alleged agency relationship is the delegation agreement currently in effect between the State and County Health Departments. There is absolutely nothing in that agreement which would legally establish an agency relationship between the State and County. Moreover, as early as 1974, this Court held that the legislation dealing with health problems envisioned, not an agency relationship, but rather an independent multi-level governmental system consisting of state, county and municipal boards of health. State v. Kelsall, 22 Ariz. App. 97, 523 P.2d 1334 (1974).

Finally, assuming Black Cloud's contention had any merit whatsoever, the superior court in a judicial review of an administrative proceeding only acquires jurisdiction over those persons who were parties to

the administrative proceedings. A.R.S. § 12-908; Roer v. Superior Court In and For Coconino County, 4 Ariz. App. 46, 417 P.2d 559 (1966). Since the State Director was not joined in the proceedings before the County Board, he could not be joined in the superior court review of that proceeding.

At oral argument, Black Cloud hinted that the Director of the State Health Department had been joined in the second lawsuit against the County because the State Director has a statutory duty to oversee the County's regulation of public and semipublic pools. Black Cloud further claims that the State Director erroneously failed to dischsrge this duty after the time when he was informed by Black Cloud of the dispute over the spa with the County. This argument is inapposite given the posture of this appeal and the nature of Black Cloud's original complaint in this lawsuit. Even if Black Cloud's claim that the State Director had a legal duty to oversee the County were true, the proper method to compel performance of such a duty is to apply for

a writ of mandamus pursuant to A.R.S. § 12-2021-2030. Black Cloud made no efforts to apply for this writ and instead chose simply to join the State Health Director in a lawsuit against the County. In short, we find the attempt to join the State Director to be completely without merit.

Black Cloud's final argument is that the trial court erred in awarding attorney's fees pursuant to A.R.S. § 12-341.01(C) in favor of the State Health Department. Specifically, Black Cloud maintaines that A.R.S. § 12-341.01(C) does not authorize an award of attorney's fees where a litigant is exercising his or her right to seek redress from the government. In addition, Black Cloud argues that an award of attorney's fees under A.R.S. § 12-341.01(C) requires a finding by clear and convincing evidence that the claim constitutes harrassment, is groundless and not made in good faith. According to Black Cloud, the trial court did not make this required finding and thus the award cannot stand. Lastly, Black Cloud asserts that an award of attorney's fees

in this case is contrary to A.R.S. § 12-348(A)(3).

A.R.S. § 12-341.01 provides that:

> [r]easonsble attorney's fees shall be awarded . . . upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith . . ..

A.R.S. § 12-341.01(C).

In Wistuber v. Paradise Valley Unified School Dist., 141 Ariz. 346, 687 P.2d 354 (1984), the Supreme Court held that where aggrieved citizens in good faith seek a determination of the legitimacy of governmental actions, attorney's fees should not usually be awarded in contract actions under A.R.S. § 12-341.01(A). However, the Court went on to state that "[i]f an action brought against a governmental body is groundless or frivolous, or is brought for the purpose of harassing that body, the court has discretion to award attorney's fees quite apart from any contractual theory. See A.R.S. § 12-341.01(C)." Wistuber, 141 Ariz. at 350, 687 P.2d at 358.

In this case, the trial court found that "no good (or even colorable) reason" had been shown for

joining Director Novick in the second lawsuit against the County. As previously indicated, this finding is fully supported.

A.R.S. § 12-341.01(C) was enacted to provide compensation to parties who are required to defend meritless claims. The State Health Department was not in any way connected with the cease and desist order and subsequent administrative hearing involving the County Health Department. Therefore, the claim brought by Black Cloud against Director Novick was without merit and served only to harass the State.

Finally, an award of attorney's fees to the State in this case is not contrary to A.R.S. § 12-348. That statute provides that:

> [i]n addition to any costs which are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town or county which prevails by an adjudication on the merits in any of the following:
>
> . . .
>
> 3. A court proceeding to review a state agency decision pursuant to chapter 7, article 6 of this title, or any other statute authorizing judicial review of agency decisions. (Footnote omitted

and emphasis added).

A.R.S. § 12-348(A)(3) (Supp. 1984).

By its own terms, this statute addresses a situation where attorney's fees are awarded as a supplement to fee awards made pursuant to other statutes. In other words, A.R.S. § 12-341.01 and 12-348 operate independently of each other and the latter was not intended to be used to preclude fee awards under the former.

Both the State and County Health Departments have requested attorney's fees for litigating this appeal on grounds the appeal is frivolous. We agree. Pursuant to Rule 25, Arizona Rules of Civil Appellate Procedure, we award attorney's fees to both the State and the County. Both of the appellees should comply with Rule 21(c), Arizona Rules of Civil Appellate Procedure.

Judgment affirmed.

/s/ Eino M. Jacobson

Eino M. Jacobson, Judge

CONCURRING:

/s/ Sarah D. Grant

Sarah D. Grant, Presiding Judge

/s/ Jack L. Ogg

Jack L.Ogg, Judge

OFFICE OF THE MARICOPA COUNTY ATTORNEY
Barbara Lee Caldwell
Civil Division
Central Courts Building
201 West Jefferson Street, 7th Floor
Phoenix, Arizona 85003
Attorney for Defendant Robert G. Harman,
Director, Maricopa County Department of
Health Services

ROBERT K. CORBIN
Attorney General

CHIP WAGONER
JAMES DONALD VIEREGG
Assistant Attorneys General
1275 West Washington
Phoenix, AZ 85007
Telephone: (602) 255-1610

Attorneys for Defendant, Dr. Lloyd F. Novick,
Director of the Arizona Department of Health Services

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation,	)	NO C-502759
Plaintiff,	)	ORDER OF DISMISSAL
vs.	)	(Assigned to the Honorable B. Michael Dann, Division 32)
ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona	)	

Department of Health Services,)
)
Defendants.)
)

The Court having reviewed the Motion to Dismiss filed by Defendant Robert G. Harman herein, the response thereto filed by the Plaintiff and the reply filed by Defendant Harman and having reviewed the file herein, concludes that the issues raised in Plaintiff's complaint herein have previously been litigated in Cause No. C-478669, which is presently on appeal in the Court of Appeals, Cause No. CIV-7375.

The Court having reviewed the Motion to Dismiss filed by Defendant Donald B. Mathis, (predecessor of Lloyd F. Novick), herein, the response thereto filed by the Plaintiff, and the reply filed by Defendant Mathis (Novick) and having reviewed the file herein, concludes that no valid claim for relief has been stated as against Lloyd F. Novick or the Arizona Department of Health Services.

IT IS ORDERED that Defendant Harman's Motion to Dismiss is Granted

IT IS ORDERED that Defendant Novick's Motion to Dismiss is Granted

IT IS FURTHER ORDERED that there being no just reason for delay, judgment is hereby entered in favor of defendants Robert G. Harman, the Maricopa County Department of Health Services, Lloyd F. Novick and the Arizona Department of Health Services pursuant to Rule 54(b), Arizona Rules of Civil Procedure.

With respect to attorney's fees, the Court having previously taken under advisement the Plaintiff's Objections to Defendants' Application for Attorneys' Fees and the Court having considered the arguments of counsel, concludes that the earlier judgment in favor of defendants Harman and the Maricopa County Department of Health Services is subject to revision since it does not contain a Rule 54(b) certification. The earlier award of attorneys' fees in favor of said defendants is vacated, the Court being unable to say that plaintiff's claims against defendants Harman and the Maricopa County

Department of Health Services were baseless and in bad faith. See Wistuber v. Paradise Valley Unified School District, ____ Ariz. ____, 687 P.2d 354 (1984). Thus, plaintiff's Motion to Amend that judgment is granted.

However, plaintiff's objection to the Application for Attorneys' Fees of defendant Novick and Arizona Department of Health Services is overruled, no good (or even colorable) reason having been shown for joining these defendants in plaintiff's dispute with the County agency. However, as there's more than one way to chill plaintiff's and others' rights to sue public officials (Wistuber, supra) the Court must be careful to assure that the fee awarded these defendants is reasonable in amount.

Given the above, and having considered the description of legal services on behalf of defendants Novick and Arizona Department of Health Services, the Court concludes that an award of $2,500 is both reasonable under the circumstances and not likely to deter real estate developers or commercial contractors

such as plaintiff from suing public officials when they concluded in good faith that their rights have been violated.

IT IS ORDERED that the earlier award of attorneys' fees in favor of defendants Harman and Maricopa County Department of Health Services is vacated.

IT IS ORDERED that Defendants Lloyd F. Novick and the Arizona Department of Health Services be awarded the sum of TWO THOUSAND FIVE HUNDRED DOLLARS AND 00/100 CENTS ($2,500.00) as and for attorneys' fees pursuant to A.R.S. § 12-342.01.C. and Local Rule 3.7(e).

DONE IN OPEN COURT this 2nd day of January, 1985.

/s/ B. Michael Dann

THE HONORABLE B. MICHAEL DANN
Judge of the Superior Court

6331A-3

LOGO Black Cloud Building Corporation
P.O.Box 16146.Phoenix, Arizona 85011
(602) 277-6001

December 20, 1985

Mr. David R. Postal
3601 North 7th Avenue, Suite B
Phoenix, Arizona 85013

Re: BLACK CLOUD v. MARICOPA COUNTY,
1 CA-CIV 7427 (C-478669);
BLACK CLOUD v. HARMAN & NOVICK,
1 CA-CIV 8246 (C-502759)

Dear David:

I have given careful consideration to your advice to forego any further appeal of the subject actions. I understand your belief that any further appeal will probably be fruitless and that the Arizona Supreme Court may grant further sanctions against Black Cloud. However, I feel very strongly that the County and State have overstepped their authority and that their conduct constitutes the taking of my property rights without compensation under the guise of police power.

The Court of Appeals has failed to come to grips

with the issues. For instance they reject the clear language of the delegation agreement between the County and the State as meaning anything, and the failure to allow for redress. It seems that occassionally the Arizona Five see through the wool, and will tackle the more difficult issues with a clear eye.

I have an absolute right to request redress of the County and State for the wrongs that I believe they have committed. I also have an absolute right to take my request for redress to the United States Supreme Court. I must exhaust all state remedies before I can take my request for redress to the United States Supreme Court. This requires that I petition the Arizona Supreme Court for review of the Court of Appeals decision. I realize we have much more strength in the original action, however I don't believe I can preserve only that action.

I will not be denied my right of access to the

United States Supreme Court by the threat of sanctions. File a Petition for Review in both cases, time does not permit me to find other counsel for the Petition for Review. If you do not wish to carry these cases to the United States Supreme Court I will retain other counsel.

Sincerely,

/s/ Isabel D. Wood
Isabel Wood
President

86-161

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-161

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner

v.

ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents

Response to Petition for a Writ of Certiorari to the Supreme Court of the Supreme Court of the United States

Barbara Lee Caldwell
Deputy County Attorney
Civil Division, 7th Fl.
201 West Jefferson
Central Courts Building
Phoenix, Arizona 85003

QUESTIONS PRESENTED

I

Whether this Court has jurisdiction to entertain the petition for Writ of Certiorari filed by Isabel Wood because she is not an attorney admitted to practice law, pursuant to Rule 5 of the Rules of Procedure of the Supreme Court.

II

Whether there are any constitutional deprivations involved in the issues set forth by Petitioner Black Cloud Building Corporation.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, Respondent certifies that the following is a complete list of all parties to the proceedings below:

Black Cloud Building Corporation, an Arizona corporation, Petitioner-Plaintiff

Dr. Lloyd F. Novick, Director, Arizona Department of Health Services, Respondent-Defendant

Robert G. Harman, Director, Maricopa County Department of Health Services, Respondent-Defendant

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES. iv

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES. 1

JURISDICTION. 2

CONSTITUTIONAL PROVISIONS AT ISSUE. . 3

STATEMENT OF THE CASE 4

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI. 6

CONCLUSION. 19

CERTIFICATE OF SERVICE. 20

APPENDIX. 1a

TABLE OF AUTHORITIES

Cases

Leis v. Flynt, 439 U.S. 448, 99 S.Ct. 698 (1979). 10

Contra Costa v. City of Concord, 551 F.Supp. 87 (D.C. Cal. 1980. 18

Haberkorn v. Sears Roebuck & Co., 5 Ariz. App. 397, 427 P2d 378 (1978). . . 9

McDonald v. Smith, 105 S.Ct. 2787 (1985). 14

O'Bannon v. Town Court Nursing Center, 100 S.Ct. 2467. 15

Ramada Inns v. Lane Bird Advertising, Inc., 102 Ariz. 127 426 P2d 395 (1967). 7

Wright v. Lane County District Court, 647 F2d 940 (1981). 9

Young v. American Mine Theatres, Inc., 96 S.Ct. 2440 (1976). 17

Statutes

A.R.S. § 12-341.01(C) 12

U.S.C. 1257(3) 2, 3, 11, 13

Rules

Arizona Rules of Civil Appellate Procedure, Rule 25 . . . . . .13, 25

Supreme Court Rules, Rule 5 6

Rule 16 11

NO. 86-161

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BLACK CLOUD BUILDING CORPORATION
Petitioner

v.

ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services
Respondents

Response to Petition for a Writ of Certiorari to the Supreme Court of the Supreme Court of the United States

The Petitioner Black Cloud Building Corporation has filed a Petition for Writ of Certiorari through Isabel D. Wood, who is the president of Black Cloud Building Corporation. Isabel Wood is not an attorney duly authorized to practice law

in the State of Arizona and is not admitted to practice in the United States Supreme Court to the best of Respondent Harman's information.

In the State of Arizona, lay persons are not permitted to represent others in legal proceedings and corporate officers are barred by statute from representing corporations.

JURISDICTION

It is the position of Respondent Harman that Petitioner has not met the jurisdictional requirements for two reasons. First, Isabel Wood is unable to represent Petitioner and second that 28 U.S.C. 1257(3), permits a Petition of Writ of Certiorari when the validity of a state statute is drawn into question as repugnant to the Constitution of the United States.

Petitioner does not set forth the statute which it challenges as being

unconstitutional but merely cites the First and fourteenth Amendments of the Constitution of the United States as being violated by the Arizona courts.

CONSTITUTIONAL PROVISIONS AT ISSUE

Petitioner has set forth the First Amendment and Fourteenth Amendment as being the constitutional amendments in question in the within case. However that is contrary to 28 U.S.C.A. 1257(3) because that statute provides that a Petition for Writ of Certiorari is proper when the validity of a treaty or statute of the United States or State statute is drawn into question. Certainly Petitioner is not questioning the First and Fourteenth Amendment of the U.S. Constitution but there are no statutes cited by Petitioner that would give this Court jurisdiction to review the opinion of the Supreme Court of the State of Arizona. The obvious

answer to the omission of such statutes is that there has been no constitutional deprivation to the petitioner herein.

STATEMENT OF THE CASE

Petitioner Black Cloud Building Corporation constructed a housing development consisting of 24 condominiums under the name of Village East Condominiums. In addition, a spa was installed for use by the 24 condominium owners. Petitioner Black Cloud Building Corporation took the position that it was a private bathing place as opposed to a semi-public bathing place as classified and regulated by the Maricopa County Health Department.

Petitioner Black Cloud Building Corporation filed a declaratory judgment action in the Superior Court of Maricopa County which was Cause No. C478669 and judgment was rendered for Defendant Maricopa County. Black Cloud Building

Corporation appealed that decision to the Arizona Court of Appeals and the Superior Court ruling was affirmed. A copy of the decision by the Court of Appeals is included in this response in the Appendix.

Petitioner Black Cloud Corporation, while the above described appeal was pending in the Arizona Court of Appeals, filed an additional action in the Superior Court of Maricopa County appealing the decision of an administrative hearing officer relative to the regulation and added an additional party, the State of Arizona.

After dismissal of the action by the Superior Court of Maricopa County, Petitioner Black Cloud again appealed to the Arizona Court of Appeals and was unsuccessful in its endeavor to obtain a reversal. The Petition for Writ of Certiorari of Black Cloud Building Corpor-

ation includes the Memorandum Opinion of the Court of Appeals and Order of the Supreme Court of the State of Arizona relative to this case. Those opinions will not be duplicated herein.

In the opinion of Respondent Harman, there are no constitutional issues in the proceedings herein.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The first and foremost reason for denying the Petition for Writ of Certiorari filed in this Court is the fact that it was filed by Isabel Wood as President of Black Cloud Building Corporation. Rule 5 of the Supreme Court Rules requires admission to the highest court of the State for three years prior to admission to practice in the Supreme Court of the United States. Isabel Wood is not an attorney nor is she admitted to practice

to the Supreme Court of the United States nor the State of arizona wherein this action was commenced.

Arizona has statutes prohibiting the practice of law by officers of a corporation unless they are admitted to practice. In Ramada Inns, Inc. v. Lane and Bird Advertising, Inc., 102 Ariz. 127 426 P.2d 395 (1967) the Supreme Court of the State of Arizona held that:

> Absent statutory authority a corporation cannot practice law even in its own behalf. A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona. Paradise v. Nowlin, 86 Cal. App. 2 897, 197 P2d 867; Title v. Highland Dairyman's Assoc., 10 Utah 2nd 195 350 P2d 616; Nicholson Supply Co. v. First Federal Savings, Fla. App. 185 S0.2d 438; Niklaus v. Able Construction, 164 Neb. 842, 83 N.W.2d 94.
>
> So in finding the defendant's answer defective because not signed by an attorney the trial court followed the position

taken by the vast majority of jurisdictions."

In addition, Arizona Revised Statute § 32-261(A) provides as follows:

> Except as provided in subsection C and D, no person shall practice law in this state unless he is an active member of the State Bar in good standing as defined in this chapter.

Subsection C provides as follows:

> An officer of a corporation who is not an active member of the State Bar may represent the corporation before a justice court or a police court provided that: (1) The corporation has specifically authorized such officer to represent it before such courts; (2) Such representation is not the officer's primary duty to the corporation but secondary or incidental to other duties relating to the management or operation of the corporation; (3) The corporation was an original party to or a first designee of a conditional sales contract, conveyance, transaction or occurrence which gave rise to the cause of action in such court, and the assignment was not made for collection purposes.

As can be readily ascertained, a corporation is limited as to when it may be represented by an officer by Arizona statute and none of the statutory provisions are applicable herein. Courts have the power to inquire into the capacity of a person attempting to represent a corporation or a person in court. In Haberkorn v. Sears Roebuck & Co., 5 Ariz. App. 397, 427 P2d 378 (1978) the Arizona Court of Appeals held at page 399 that:

> Courts may inquire as to whether a person who appears before it in a representative capacity is admitted to the practice of law.

The restriction as to who may practice law is not an unconstitutional provision. In Wright v. Lane County District Court, 647, F2d 940 (1981) the Ninth Circuit held on page 941 that:

> In an action nearly identical to this one, the Arizona statutes forbidding the unauthorized

> practice of law were sustained by the State Supreme Court in Hackin v. State, 102 Ariz. 218, 427 P2d 910, appeal dismissed, 389 U.S. 143, 88 S.Ct. 325, 19 L.Ed.2d 247 reh. denied, 389 U.S. 1060, 88 S.Ct. 766, 19 L.Ed.2d 866 (1967). The Supreme Court dismissed Hackin's appeal for lack of substantial federal question. (Cites omitted)
>
> * * *
>
> The Oregon Statute is not unconstitutional.

The plaintiff in that case had brought a declaratory judgment challenging the constitutionality of Oregon's statute prohibiting an unauthorized practice of law. As can be ascertained, the Ninth Circuit held that it was not unconstitutional. Such would also be applicable to the Arizona statute which likewise is not unconstitutional and prohibits the practice of law by officers of the corporation as well as the Rules of this Court.

In Leis v. Flynth, 439 U.S. 448, 99 S.Ct. 698 (1979) this Court sustained the

Ohio Court which refused to allow out of state attorneys to represent defendants in a criminal case who were not admitted to practice in Ohio. It was held that the asserted right of an out of state attorney to appear pro hac vice does not fall among those interests protected by the 14th Amendment.

For those reasons this Court should dismiss this action pursuant to Rule 16 of the Rules of the Supreme Court because the case does not present a substantial question, and further that there is no party properly before this Court but instead a person attempting the unauthorized practice of law.

The Court should further deny the Petition for Writ of Certiorari because there are no issues raised by Petitioner that challenges any Arizona Statute. This is a prerequisite under 28 U.S.C.A. 1257(3).

Petitioner has alleged that because it was required to pay attorney's fees for a frivolous action that it is being denied the right to redress a grievance. This is certainly not compatible with the actions of Petitioner herein. Petitioner has filed two actions relative to the same set of circumstances, one while another action was pending in the Arizona Appellate Court. In its second action it added an additional party who was not involved at all in the issues that were the subject matter of the lawsuit. Respondent Harmon was successful in getting the second action dismissed as frivolous and Defendant Novick also was successful in getting the action dismissed.

Arizona Statutes provide for the recovery of attorney's fees in frivolous actions. A.R.S. § 12-341.01(C) provides as follows:

> Reasonable attorney's fees shall be awarded by the Court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith. In making such award, the Court may consider such evidence as it deems appropriate and shall receive this evidence during the trial on the merits of the cause, or separately, regarding the amount of such fees as it deems in the best interest of the litigating parties.

The Court of Appeals clearly stated in its opinion that the statute was enacted to provide compensation to persons or parties who were required to defend meritless claims. The Court held that attorney's fees were warranted not only in the trial court but also in the court of appeals pursuant to Rule 25 of the Appellate Rules. Rule 25 of the Rules of Appellate Procedure provide as follows:

. . .

. . .

Sanctions for delay or other infractions:

> Where the appeal is frivolous or taken solely for the purpose of delay, or where a motion is frivolous or filed solely for the purpose of delay, or where any party has been guilty of an unreasonable infraction of these rules, the appellate court may impose upon the offending attorneys or parties such reasonable penalties or damages (including contempt, withholding or imposing of costs, or imposing of attorneys' fees) as the circumstances of the case and the discouragement of like conduct in the future may require.

The Arizona Court of Appeals was very specific in determining that the appeal was frivolous and awarded attorneys' fees under that rule. That entire opinion is set forth in Petitioner's Petition for Writ of Certiorari and will not be duplicated herein.

In McDonald v. Smith, 105 S.Ct. 2787 (1985) this Court declared that the right to petition the government for redress of

grievances does not necessarily grant freedom from the consequences of those rights.

The Petition for Writ of Certiorari is not properly before this Court because it does not comply with the requisite jurisdictional issues and further the issues presented are not issues which this Court can address based upon the pleadings before the Court.

There are no First or Fourteenth Amendment violations set forth by Petitioner. The fact of the matter is that Petitioner as a construction company chose to violate the building regulations of the State of Arizona and Maricopa County by failing to obtain a permit prior to the installation of a semi-public bathing place. When Black Cloud Building Corporation refused to comply with the regulation, a Cease and Desist Order was

issued by the Maricopa County Health Department prohibiting use of said facility. In O'Bannon v. Town Court Nursing Center, 100 S.Ct. 2467 (1980) this Court said:

> ...We hold that the enforcement by HEW and DPS of their valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty or property.

In that case an action was brought by a nursing home against the Department of Health Education and Welfare and the Pennsylvania Department of Public Welfare because the departments had revoked the nursing home's authority to provide elderly residents of the home with nursing care at government expense under Medicare and Medicaid. The theory of the plaintiffs was that they were entitled to an evidentiary hearing on the merits of the revoca-

tion before the payments were discontinued. This Court held that there was no constitutional right to a hearing prior to the revocation of a home's authority to provide care.

Here, as in that case, there is no constitutional deprivation to Petitioner for failure to comply with the Health Code of Maricopa County which requires approval of plans for semi-public bathing places.

In Young v. American Mini Theatres, Inc., 96 S.Ct. 2440 (1976) this Court held that:

> Ordinances of Michigan were not violative of First Amendment Rights or the Equal Protection Clause of the Fourteenth Amendment.

In that case the operation of an "adult" movie theatre filed a Petition for Writ of Certiorari challenging the ordinance prohibiting the operation of an "adult" movie theatre-bookstore within a thousand

feet of any other establishment or five hundred feet of a residential area. The claim was that it violated constitutional rights but this Court held that it did not.

In Contra Costa v. City of Concord, 551 F.Supp. 87 (D.C.Cal. 1980) that court addressed the constitutionality of rules and regulations in relation to an existing ordinance and redevelopment plans of the city. The court stated at page 89 that:

> ...Alleged violations of 'rights' that arise exclusively out of a failure to comply with the procedures provided by city charter, ordinances and regulations do not sustain a federal constitutional claim. State of Missouri ex rel. Gore v. Wochner, 620 F2d 183, 185 (8th Cir., 1980).

Here, as in that case, there are no constitutionally protected rights that have been violated by Maricopa County or the State of Arizona, and certainly there has been no constitutional rights violated

by the Arizona Supreme Court or the Arizona Court of Appeals. The Arizona Statutes and Rules of the Appellate Court provide for the award of attorneys' fees in frivolous matters and having found the case of Black Cloud Building Corporation was without merit, the court then followed the statute in an effort to discourage frivolous actions.

CONCLUSION

For all of the above reasons and cases hereinabove set forth, it is respectfully requested that this Court summarily deny and dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

MARICOPA COUNTY
ATTORNEY'S OFFICE

Barbara Lee Caldwell
Deputy County Attorney

Date: August 22, 1986.

CERTIFICATE OF SERVICE

This is to certify that three copies of this Response to Petition for a Writ of Certiorari have been served on all parties required to be served by mailing same to the following:

Isabel D. Wood, President
Black Cloud Building Corporation
Post Office Box 16146
Phoenix, Arizona 85011

Chip Wagoner
Assistant Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

Dated this 28 day of August, 1986.

Barbara Lee Caldwell
Deputy County Attorney

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED DEC 10 1985

GLEN D. CLARK, CLERK
By R. Ortegon

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BLACK CLOUD BUILDING CORPORATION, an Arizona corporation,	1 CA-CIV 7427 1 CA-CIV 7375 (Consolidated)
Plaintiff-Appellant,	DEPARTMENT D
v.	O P I N I O N
MARICOPA COUNTY, a political subdivision,	
Defendant-Appellee.	

Appeal from the Superior Court
of Maricopa County

Cause No. C-478669

The Honorable David L. Grounds, Judge

AFFIRMED

David R. Postal, P.C. Phoenix
by David R. Postal
Attorney for Plaintiff-Appellant

Tom Collins, Maricopa County Attorney
by Barbara Lee Caldwell,
Deputy County Attorney
Attorneys for Defendant-Appellee Phoenix

J A C O B S O N, Judge

In this action for declaratory judgment, the appellant, Black Cloud Building Corporation (Black Cloud), challenges the authority of the Maricopa County Department of Health Services (County Health Department) to regulate a spa located within the common area of a condominium complex. The trial court granted summary judgment in favor of the appellee Maricopa County.

The issues which we must determine on appeal are: (1) whether the County Health Department is authorized to define public and semipublic pools and bathing places, and to issue licenses and assess fees; (2) whether a spa located within the

common area of a condominium complex is a semipublic pool or bathing place; and (3) whether regulation of spas by the County Health department violates the City of Phoenix's health ordinances.

The facts material to the resolution of this appeal are not in dispute. Prior to November, 1982, Black Cloud, a licensed general contractor, began constructing a 24-unit condominium development known as Village East Condominiums in Phoenix, Arizona. As part of the project, Black Cloud installed a 7.5' x 7.5' x 3' fiberglass spa in the common area of the development. Black Cloud neither submitted construction plans nor obtained a permit from the County Health Department to operate the spa prior to or after installing it.

The Maricopa County Health Code proscribes the construction of bathing

places without first submitting plans to and receiving the approval thereof from the County Health Department. The code also proscribes the operation of public or semipublic bathing places without a permit issued by the County Health Department. In addition, the Department charges fees for inspecting, licensing and regulating public and semipublic bathing places.

On November 9, 1982, the County Health department notified Black Cloud that the spa at the Village East Condominiums had been constructed illegally because of Black Cloud's failure to obtain the necessary permits and approval, and because the color of the spa did not meet Code specifications.

On January 19, 1983, Black Cloud filed a complaint in Superior Court against Maricopa County, requesting a declaratory judgment and injunctive

relief. In the complaint, Black Cloud sought a judgment declaring the County Health Department regulations void where they conflicted with the regulations of the Arizona Department of Health Services (State Health Department) and that the County Health Department had no statutory authority to charge or collect inspection, testing or licensing fees. Black also requested the court to enjoin County Health Department employees from entering the condominium complex, harassing Black Cloud employees or subcontractors, and posting the spa closed or initiating legal action against Black Cloud because of the spa.

By its judgment, the trial court determined that the County had the necessary statutory authority to regulate the installation and inspection of semipublic swimming pools and to charge fees in

accordance with a fee schedule adopted by the Maricopa County Board of Supervisors. The trial court further concluded that the condominium spa was a semipublic pool subject to regulation by the County Health Department. Black Cloud appeals from that judgment.

On August 9, 1983, the County Health Department issued a cease and desist order directing Black Cloud to cease operating the spa until construction plans were submitted to and approved by the County Health Department. Black Cloud requested and received an administrative hearing with the County Health Department to review the cease and desist order. On November 10, 1983, the County Health Department's hearing officer rendered a written decision concluding that the issues raised by Black Cloud were moot in light of the proceedings in superior

court. Black Cloud then instituted a special action in the superior court challenging the validity of the administrative hearing. Black Cloud has also appealed an adverse judgment in that proceeding. That appeal will not be addressed in this opinion.

STATUTORY AUTHORITY TO DEFINE, ISSUE LICENSES AND ASSESS FEES

Black Cloud first maintains that the County Health Department has no statutory authority to "define" public and semipublic pools and bathing places, or to issue licenses and assess fees. In determining the validity of this position, we start with the proposition that if the legislature gave statutory authority to the State Health Department to regulate a specific activity or to attain specific objectives, like authority is possessed by the County Health Department. State v. Kelsall, 22

Ariz. App. 97, 523 P.2d 1334 (1974).

Under Title 36 of the Arizona Revised Statutes, the State Health Department is charged with regulating health problems that affect the state at large. To accomplish this goal, the legislature has delegated substantive rule-making and enforcement powers, both general and specific, to that Department. Under A.R.S. § 36-136(F), the State Health Director is authorized to "make and amend rules necessary for the proper administration and enforcement of the laws relating to the public health." A.R.S. § 36-136(F) (Supp. 1984). More specifically, A.R.S. § 36-136(G)(14) provides that the State Director:

> shall, by regulation: ... [p]rescribe reasonably necessary measures to prevent pollution of water used in public or semipublic swimming pools and bathing places and to prevent deleterious health conditions at such

> places. The regulations shall prescribe minimum standards for design of pools, for sanitary conditions which shall be maintained at any public or semipublic swimming pool or bathing place, and shall provide for inspection of such premises and for abatement as public nuisances of any premises and facilities which do not comply with the minimum standards.

A.R.S. § 36-136(G)(14) (Supp. 1984).

In addition to enumerating the various powers and duties of the State Health Director, Title 36 also contemplates the involvement of local health boards to regulate health problems on a local level. For example, A.R.S. § 36-136(D) authorizes the State Health Director to delegate any of his or her functions, powers or duties to recognized local health departments. Furthermore, A.R.S. § 36-136(H) authorizes local health boards to adopt regulations as authorized by law within their jurisdiction, provided they

do not conflict with state law, and are equal to or more restrictive than the regulations of the State Director. Pursuant to A.R.S. § 36-136(D), a delegation agreement is in effect between the State Health Director and the Maricopa County Health Department. That agreement specifically delegates the State Health Director's functions, powers and duties regarding the construction and operation of public and semipublic pools to the County Health Department.

While Black Cloud does not challenge the validity of the delegation agreement itself, it argues that the State Health Director has no power to "define" public and semipublic pools and thus such power cannot be delegated to or assumed by Maricopa County. The argument rests on the observation that A.R.S. §367-136(G)(14) only expressly delegates the power to

"prescribe" and not the power to "define" reasonably necessary measures to protect public and semipublic pools. To fortify the argument, Black Cloud points to other subsections of the same statute wherein the legislature specifically delegated both the power to "define" and to "prescribe" certain public health measures.

In light of the overall statutory scheme governing public health regulations in this state, we find nothing significant in the fact that A.R.S. § 36-136(G)(14) omits the phrase "to define" from its provisions. As stated earlier, A.R.S. § 36-136(F) delegates broad and general rule-making authority to the State Health Director. The power granted in that subsection necessarily subsumes the power to "define." Since the State Health Director delegated his powers concerning public and semipublic pools to the County

Health Department, we conclude that the County must also have the power to "define" public and semipublic pools and bathing places.

In challenging the County Health department's power to issue licenses and assess fees, Black Cloud again argues for a narrow reading of our public health statutes. A.R.S. § 36-187(C) provides that:

> [a] county board of health . . . may adopt a schedule of reasonable fees . . . for issuing or renewing licenses or permits or for other services as are authorized by law . . ., provided that:
>
> * * *
>
> 3. Any such fee or schedule shall be approved by the county board of supervisors.

A.R.S. § 36-187(C) (Supp. 1984). Pursuant to this statute, the County Health Department has adopted a fee schedule which covers the issuance of licenses and permits for the operation of

public and semipublic pools and bathing pools.

Black Cloud maintains, however, that the County Health Department is not authorized by law to issue licenses or permits since no statute expressly grants this power. Without the authority to issue licenses, Black Cloud argues that the County Health Department has no power to assess fees either. This argument is without merit. When A.R.S. § 36-187 is read in context with the entire statutory scheme governing public health, we find ample authority to support the County Health Department's licensing and fee collecting functions.

A.R.S. § 136(G)(14) specifically authorizes the prescription of reasonably necessary measures to prevent deleterious health conditions at public and semipublic pools. The regulations are to include

minimum standards for pool design as well as for sanitary conditions at the pools. The statute goes on to provide for the inspection of public and semipublic pools and for abatement of non-complying facilities. A.R.S. § 136(F) grants the authority to make and amend rules necessary for the administration of the public health laws. The language and purpose of these statutes, when read in conjunction with A.R.S. § 36-187, is sufficient, as a matter of law, to support the authority of the County Health Department to issue licenses and assess fees.

SEMIPUBLIC POOLS AND BATHING PLACES

Black Cloud next contends that the spa located at Village East Condominiums is private and therefore not subject to public health regulation. A.R.S. § 136(G)(14) provides only for regulation of public and semipublic pools and bathing

places. We agree that if the spa here does not fall within the definition of "public" or "semipublic", that is, the spa is "private", then the County Health Department lacks authority to regulate its construction or use.

Since the legislature did not define the terms "public" and "semipublic" as used in A.R.S. § 36-136(G)(14), we must interpret these terms in light of the intent of the legislature. In ascertaining such intent, we look to the plain meaning of the words employed, the context in which they are used, the overall subject matter, the effects and consequences of different meanings, and the spirit and purpose of the legislation. Apache East, Inc. v. Wiegand, 119 Ariz. 308, 580 P.2d 769 (App. 1978). In addition, although it is not conclusive, interpretation of a statute by an administrative agency

charged with its implementation is entitled to great weight. Marlar v. State, 136 Ariz. 404, 666 P.2d 504 (App. 1983); McLeod v. Chilton, 132 Ariz. 9, 643 P.2d 712 (App. 1981), cert. denied, 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982).

The Arizona Department of Health Services defines a "public pool" as:

> a swimming pool such as municipal, community, commercial, or cooperative, admission to which may be gained by the general public with or without payment of a fee.

A.C.R.R. R9-8-811(K) (Supp. 1980).

The definition of a "semipublic pool" is:

> a swimming pool on the premises of, or part of, a hotel, motel, trailer court, apartment house, country club, camp or similar establishment where the primary business of the establishment is not the operation of swimming facilities and where admission to the use of the pool is included in the fee, or consideration paid or given for the primary use of the premises.

A.C.R.R. R9-8-811(N) (Supp. 1980).

Finally, a "private pool" is defined as"

> a pool established or maintained on any premise by an individual for his own or his family's use, or for guests of his household.

A.C.R.R. R9-8-811(J) (Supp. 1980).

The definitions of these terms in the regulations of the County Health Department are substantially similar to those quoted above, except that the County expressly includes pools at "condominiums" within the definition of a "semipublic pool."

Black Cloud maintains that regardless of these administrative definitions, the spa at the Village East Condominiums is private because it is privately owned by the individual condominium owners. The argument hinges on the fact that title to the common areas of the complex, including the spa, is held in fee by all of the condominium owners as tenants in common. In other words, Black Cloud contends that

since the owners possess a freehold estate in the spa, it must therefore be private and not subject to public health regulations. Even if title to the spa is held jointly in fee by the condominium owners, we find Black Cloud's argument unpersuasive for in our opinion it is not how title to the spa is held, but rather how the spa is used that determines its public or semi-public characteristic.

It is apparent that A.R.S. § 136(G)(14) is designed to protect a class of users of pools and bathing places --those that come in contact with relative strangers in a water environment. It is pools that are frequently used by many persons with the attendant health hazards, such as the transmission of communicable diseases, toward which such legislation was directed.

The fact that the spa at the Village East Condominiums may be owned in fee by

all the condominium owners does not change the semipublic nature of the communal spa or the legislative intent concerning the need for public health regulation at such places. The spa was installed to accommodate all 24 units of the complex and is not maintained for the use of any single individual or family. Given the nature and extent of the proposed use of the spa, it cannot be considered private in the traditional connotations of that word.

The fee ownership analysis argued by Black Cloud is also undercut by the fact that no individual condominium owner possess an absolute right to use the spa. The recorded Declaration of Horizontal Property Regime and Declaration of covenants, Conditions and Restrictions for the Village East Condominiums states that, appurtenant to each condominium unit, is a non-exclusive right and easement to use

the common elements, including the spa, in common with all other authorized users. This easement is subject to certain rules and restrictions promulgated by the Board of Directors of the Condominium Association. One such restriction is the right of the Board to suspend the use of the recreational facilities from any condominium owner or occupant who fails to pay his or her share of the common expenses. These expenses are used to maintain the common areas including the spa.

As the trial court found, the fact that an owner may be precluded from using the spa brings the spa in question squarely within the administrative definition of a "semipublic" pool. Both the State and County Health Departments define semipublic pools to include pools at establishments where the operation of the pool is secondary to the primary business of the establishment

and where admission to the use of the pool is included in a fee paid for the primary use of the premises. Although we are not bound by this definition of a semipublic pool, we find that it is reasonable and should be applied in this case in light of the spirit and purpose embodied in the underlying statutory authority.

Other jurisdictions have reached similar conclusions. In Lucas v. Hesperia Golf & Country Club, 63 Cal. Rptr. 189, 255 Cal. App. 2d 241 (1967), the California Court upheld the application of public health regulations dealing with lifeguards at pools to a swimming pool owned and operated by a private country club. In that case, the court stressed the fact that a pool may be "public" even though it is not open to the public at large. The nature and extent of the use of the pool, rather than its "private" ownership were

deemed controlling. See also Askew v. Parker, 151 Cal. App. 2d 759, 312 P.2d 342 (1957) (holding that a pool owned by a private religious organization was a "public pool" subject to public health regulation); (Commonwealth v. Apple Valley Racquet Club, 20 Pa. Commw. 325, 342 A.2d 150 (1975) (concluding that a swimming pool owned and operated by a private club for the use of club members and their guests becomes "public" when members of the public at large may be admitted through private invitation); Annot. 87 A.L.R.3d 1032 (1978).

More recently, in Hall Harbor Ass'n, Inc. v. Cape May County, 196 N.J. Super. 533, 483 A.2d 445 (1984), the court was asked to decide whether the state swimming pool Code applied to a condominium association. After reviewing the decisions from other jurisdictions, which virtually all

favor allowing public health regulation of pools at private clubs, hotels and motels, etc., the court concluded that the swimming pool code was applicable to a condominium association.

In reaching its conclusion, the New Jersey court emphasized the remedial intent of the public health regulations. The court also distinguished the condominium pool from strictly private pools because the condominium pool in question was simply not maintained only for the use of an individual family and guests. The condominium pool was available to a large number of users and the public health legislation was precisely intended to cover that situation. Other important factors in reaching the result were the payment of a common fee by the owners for use of the pool, the ability of owners to rent their condominium units for indirect "profit,"

and the fact that condominium ownership does not lessen the dangers which the statute was designed to prevent.

Although these cases from other jurisdictions and the cases cited therein were primarily concerned with large swimming pools and not spas, we nonetheless find the reasoning behind those decisions relevant to this case. Given the underlying reasons for the regulation, we find that the term "semipublic pool or bathing place" as employed in A.R.S. § 136(G)(14) encompasses a spa located within the common area of a 24-unit condominium complex. Any other construction would defeat the intent of the legislature to protect the users of non-private pools and bathing places from the dangers of deleterious health conditions and water pollution.

PHOENIX HEALTH ORDINANCES

Black Cloud's final contention is that regulation of spas by the County Health Department violates the City of Phoenix's health ordinances. The argument relies on certain provisions of a 1957 consolidation agreement pursuant to which the old health departments of the City of Phoenix and Maricopa County were merged or consolidated into the present Maricopa County Health Department. According to Black Cloud, the terms of the 1957 agreement limited the new, consolidated County Health Department to providing environmental sanitation services in Phoenix only as authorized by the 1951 Phoenix City Code. Black Cloud further maintains that the 1951 City Code provides no authorization for regulating water pollution and deleterious health conditions at spas.

We find several flaws in the reasoning advanced by Black Cloud in this argument. To begin with, the 1951 Code has since been repealed and replaced with a new, more comprehensive Code. In addition, the actions of the County Health department which Black Cloud now challenges have been authorized by statute as discussed earlier in this opinion.

Also, the consolidation agreement referred to by Black Cloud states that the County Health Department shall provide "[a] program of environmental sanitation based upon generally accepted programs and standards of sanitation in use in Health Departments throughout the United States." After reviewing the operation of the County Health Department with regard to the regulation of public and semipublic pools and bathing places, we conclude that such operation is a generally accepted

environmental sanitation program in the United States. We need look no further than to our own Arizona Department of Health Services and its regulations affecting public and semipublic pools and bathing places to reach this conclusion. We find no material conflicts between the relevant environmental sanitation programs of the State and County Health Departments.

Finally, the 1951 Phoenix City Code would authorize the actions t issue here because of its broad language relating to public health. That Code vested in the city health officer the power to inspect all water and water supplies used within the city and to perform all things necessary or proper to prevent its contamination. In addition, the city health officer was empowered to force the removal of public health hazards and sources of disease from public and private property at the owner's

or occupant's expense. Therefore, even if the Maricopa County Health Department were limited by the provisions of the 1951 City of Phoenix Code, these provisions are broad enough to support the actions at issue in this lawsuit.

CONCLUSION

In conclusion, we find that the statutory scheme in Arizona governing public health and safety, combined with the delegation agreement between the State and County Health Department, provide sufficient authority to define public and semipublic pools and bathing places, and to issue licenses and assess fees. Furthermore, we conclude that a spa located within the common area of a condominium complex is not a private spa. Instead, it is a semipublic bathing place as that term is used in A.R.S. § 136(G)(14) and the administrative regulations of the

State and County Health Department promulgated pursuant to that statute. Finally, the County Health Department's regulation of spas at condominium complexes violates neither the consolidation contract creating the Department nor the 1951 City of Phoenix Code referenced in that agreement.

Based upon the foregoing, the judgment of the trial court is affirmed.

Eino M. Jacobson, Judge

CONCURRING:

Sarah D. Grant, Presiding Judge

Jack L. Ogg, Judge

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-161

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

BLACK CLOUD BUILDING CORPORATION,

Petitioner,

v.

ROBERT G. HARMAN, Director, Maricopa County Department of Health Services; DR. LLOYD F. NOVICK, Director, Arizona Department of Health Services,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

---

RESPONDENT DR. LLOYD F. NOVICK'S BRIEF IN OPPOSITION

ROBERT K. CORBIN
Attorney General
State of Arizona

ANTHONY B. CHING
Solicitor General
(Counsel of Record)
SHELDON H. MULLER
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 255-1610

QUESTION PRESENTED

Whether awarding attorney's fees to a state agency pursuant to a state statute that mandates the awarding of attorney's fees where a claim constitutes harassment, is groundless and not made in good faith, and pursuant to a state court rule of civil appellate procedure which allows the awarding of attorney's fees where the appeal is frivolous violates the right to petition the government for a redress of grievances guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
THE QUESTION PRESENTED HAS ALREADY BEEN RULED UPON BY THE COURT	2
FEDERAL STATUTES AND COURT RULES HAVE BEEN INTERPRETED TO PERMIT THE AWARDING OF COSTS AND ATTORNEY'S FEES TO THE GOVERNMENT	7
THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE COURT GRANTING REVIEW	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

	Page
Bill Johnson's Restaurants, Inc. v. NLRB 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983)	1,2,4, 5,6,9
Boomer v. United States 755 F.2d 696 (8th Cir. 1985)	8
Collorafi v. United States 579 F.Supp. 506 (E.D. N.Y. 1983	7
Connor v. Commissioner of Internal Revenue 770 F.2d 17 (2d Cir. 1985)	5
McDonald v. Smith _____ U.S. _____, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985)	6,7
State of Ohio v. Arthur Anderson & Co. 570 F.2d 1370 (10th Cir. 1978)	7
United States v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342 (9th Cir. 1985)	8
United States v. Northeastern Pharmaceutical and Chemical Company, Inc. 579 F.Supp. 823 (W.D. Mo. 1984)	8

TABLE OF AUTHORITIES (Cont'd)

	Page
Constitutions	
U.S., First Amendment	i,2,3, 4,5,6,8
U.S., Fifth Amendment	8
U.S., Fourteenth Amendment	i
Statutes	
28 U.S.C. § 1912	7,8
28 U.S.C. § 1927	7,8
I.R.C. § 6673	5,6
42 U.S.C. § 9607(a)(4)(A)	8
28 U.S.C. § 2412	8
Court Rules	
Sup.Ct.R. 17	9
Fed.R.App.P. 38	6,8
Fed.R.Civ.P. 37(a)(4)	7
Fed.R.Civ.P. 37(b)(2)	7

STATEMENT OF THE CASE

As its statement of the case, respondent adopts the Arizona Court of Appeal's decision reproduced at pp. 8a through 21a of Black Cloud's petition.

SUMMARY OF ARGUMENT

Review should be denied in light of the Court's holding in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), the numerous lower court cases awarding costs and attorney's fees to the government, and the Supreme Court rule providing for review only when there are special and important reasons therefor.

ARGUMENT

I THE QUESTION PRESENTED HAS ALREADY BEEN RULED UPON BY THE COURT

Petitioner's argument that citizens of the United States should be allowed to file frivolous lawsuits without having to pay the price for making the opposing party defend the claim is witout merit. While it is true that the First Amendment to the United States Constitution guarantees to the people the right to petition the government for a redress of grievances, this Court has already held that the right to so petition is not absolute and does not include the right to initiate baseless litigation.

In Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), a former restaurant

employee organized picketing and other forms of protest against the restaurant in response to her allegedly being fired for attempting to organize a union. The restaurant thereafter filed a lawsuit in state court seeking damages and an injunction in response to the terminated employee's actions. The employee filed a complaint with the NLRB, claiming that the state lawsuit was filed in retaliation to the employee's activities. The NLRB held a hearing on the matter which resulted in the issuance of a cease and desist order that ordered the restaurant to withdraw the state court complaint. After the Unted States Court of Appeals affirmed the Board's order, this Court held that while the NLRB must make certain findings before enjoining a lawsuit, it could enjoin a suit which lacks a reasonable basis in fact or law. While recognizing the First

Amendment right to petition the government for a redress of grievances, the Court stated that "baseless litigation is not immunized by the First Amendment right to petition." 461 U.S. at 743, 103 S.Ct. at 2170, 76 L.Ed.2d at 289. The Court then instructed the NLRB that with respect to a lawsuit that the NLRB cannot enjoin, if the state court finds against the employer and the NLRB then determines that the suit was filed in retaliation, "the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses." 461 U.S. at 747, 103 S.Ct. at 2172, 76 L.Ed.2d at 292. (Emphasis added.) In a footnote to this statement, the Court also recognized that a state has a substantial interest in deterring the filing of baseless litigtation in its courts.

The Court's holding in Bill Johnson's Restaurant, Inc. went further than the Court would have to go to rule against petitioner in the case sub judice. In Bill Johnson's, the Court held that the First Amendment right to petition does not prohibit the NLRB from totally precluding the bringing of a lawsuit if the claim is baseless. If the Court were to grant review on the instant case and find for respondents, the Court's ruling would be to the effect that the First Amendment right to petition does not prohibit the awarding of attorney's fees to a governmental agency if the lawsuit against the agency is baseless.

In Connor v. Commissioner of Internal Revenue, 770 F.2d 17 (2d Cir. 1985) the Court relied upon the holding in Bill Johnson's Restaurants, Inc. In Connor, the taxpayer argued that I.R.C.

§ 6673, which was relied upon by the tax court in awarding damages to the Commissoner, violated his constitutional right under the First Amendment to petition the government for redress of grievances. The Court of Appeals summarily rejected the argument holding that a taxpayer has no constitutional right to bring frivoluous lawsuits. The Court then went on to award the Commissioner double costs and attorney's fees for defending the appeal pursuant to Fed.R.App.P. 38.

In the same vein as Bill Johnson's Restaurants, Inc., the Court has also held that the Petition Clause does not povide absolute immunity from damages for expressing libelous and damaging falsehoods in petitions to government officials. McDonald v. Smith, ____

U.S. ____, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985).

II FEDERAL STATUTES AND COURT RULES HAVE BEEN INTERPRETED TO PERMIT THE AWARDING OF COSTS AND ATTORNEY'S FEES TO THE GOVERNMENT

In support of respondent's argument are the numerous federal statutes and court rules which permit the awarding of costs and attorney's fees against a party or the party's attorney that have been utilized in awarding such costs and fees to the government. See, e.g., State of Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir. 1978) (Arthur Andersen ordered to pay the State of Ohio its costs and expenses pursuant to Fed.R.Civ.P. 37(b)(2) and 37(a)(4) for Andersen's failure to comply with a discovery order); Collorafi v. United States, 579 F.Supp. 506 (E.D. N.Y. 1983) (U.S. awarded reasonable attorney's fees pursuant to 28

U.S.C. §§ 1927 and 2412 where the action was found to be wholly without merit); United States v. Northeastern Pharmaceutical and Chemical Company, Inc., 579 F.Supp. 823 (W.D. Mo. 1984) (U.S. awarded attorney's fees pursuant to 42 U.S.C. § 9607(a)(4)(A)); United States v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342 (9th Cir. 1985) (defense attorney personally ordered to pay the U.S. its attorney's fees pursuant to 28 U.S.C. § 1927); Boomer v. United States, 755 F.2d 696 (8th Cir. 1985) (U.S. awarded damages and double costs pursuant to 28 U.S.C. § 1912 and Fed.R.App.P. 38 for having to defend a frivolous, meritless claim despite appellant's argument that a claim based on the First and Fifth Amendments to the United States Constitution can't be frivolous). Respondent is not aware of any cases in

which costs or fees were not awarded to the government on the basis of the reasons set forth by petitioner.

III THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE COURT GRANTING REVIEW

Under Sup.Ct.R. 17, a review on writ of certiorari will be granted "only when there are special and important reasons therefor." Since the Court has already rejected the argument urged by petitioner and since petitioner makes no compelling arguments in support of the Court overruling or disapproving of its holding in Bill Johnson's Restaurants, Inc. and thereby holding that citizens should be allowed to file frivolous lawsuits against the government without having to pay the cost incurred by the government in defending the meritless claims, the Court should deny review.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny review of Black Cloud's petition.